IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, VS. ANDREA ALDACO and ADRIAN SEVERO REYNA, SR., Defendants,	Case No. 19-CR-0070-SWS

ORDER DENYING MOTION TO SUPPRESS

This matter comes before the Court on Defendants' Motions to Suppress. (ECF Nos. 51, 52). Both Defendants argue there was not reasonable suspicion for a traffic stop nor probable cause to search the vehicle. The Court having considered the motions and briefing, oral argument on the matter, and being otherwise fully advised, finds as follows:

BACKGROUND

On February 7, 2019, Trooper Petruso stopped a rental vehicle driven by Defendant Reyna in which Defendant Aldaco was a passenger. (ECF No. 51-1). According to the testimony the Trooper stopped the vehicle for failure to signal a lane change. (*Id.* at 7). There is no video of this portion of the stop. (*Id.* at 16). The reasons for this were disputed at the hearings on this matter.

Upon stopping the vehicle, Trooper Petruso observed two unrestrained children and the faint odor of marijuana. (*Id.* at 7; ECF No. 51-2 at 16:56:52). Defendant Reyna began opening an air freshener while talking with the Trooper. (ECF No. 51-1 at 7). He visibly places that air freshener on the rear-view mirror during the stop in the dash cam video. (ECF No. 51-2 at 16:55). Reyna indicated they were coming from Wasco, California and going to visit uncles and aunts in Minnesota for a week. (ECF No. 51-1 at 7; 51-2 at 16:56, 17:02). However, Reyna was unable to articulate where in Minnesota they were going or the names of any of the relatives they were visiting despite telling the Trooper he had been there to visit two months ago. (ECF No. 51-2 at 16:57-:58). He also gave an incorrect last name for Aldaco, purportedly his girlfriend of a year. (*Id.* at 16:58:57, 17:02). The car was rented from Long Beach, California. (ECF No. 51-1 at 7). At the time of the stop the vehicle was already a day overdue and due back in Long Beach. (*Id.*; 15-2 at 17:11). Defendant Aldaco roughly confirmed these vague plans. (ECF No. 51-2 at 17:06).

Trooper Petruso then deployed his drug detection K9 Becky.[1] (*Id.*). The Trooper's report and testimony indicates she alerted to the right wheel well. (*Id.*). The defense describes it as "what could be labeled a change in behavior." (ECF No. 52 at 2). The video shows Becky excitedly pawing at the right rear of the vehicle, spinning in circles and demonstrating continuing interest in that particular area. (ECF No. 51-2 at 17:12:32-17:14:17). A subsequent search of the vehicle revealed a duffle bag on the right side of the truck containing 21.7 pounds of methamphetamine. (ECF No. 51-1 at 8). Troopers also

[1] Neither Defendant argues the Trooper lacked reasonable suspicion at this point to prolong the stop and run the dog.

discovered a glass pipe with methamphetamine residue in the glovebox and suspected marijuana shake on the floor of the vehicle. (*Id.*).

Defendant Aldaco filed a motion to suppress on July 11, 2019. (ECF No. 51). Defendant Reyna filed a motion to suppress the same day. (ECF No. 52). They orally joined in each other's motions at the July 19th hearing. Both Defendants argue there was no reasonable suspicion for the initial stop and no probable cause to search the vehicle. The Government responded on July 16, 2019 at the direction of the Court. (ECF No. 59). The Court heard oral argument on both motions on July 19, 2019 and July 26, 2019. (ECF Nos. 61, 66).

DISCUSSION

Defendants first[2] argue there was no reasonable suspicion to institute a traffic stop. A traffic stop is a seizure within the meaning of the Fourth Amendment. *United States v. Chavez*, 534 F.3d 1338, 1343 (10th Cir. 2008). "[A] traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is

[2] To the extent there is a question of standing the Court finds both Defendants have standing to challenge the search. Defendant Aldaco rented the car and Defendant Reyna was driving the car at the time of the stop. *See Byrd v. United States*, 138 S. Ct. 1518, 1529 (2018) ("the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy."); *United States v. Walton*, 763 F.3d 655, 661 (7th Cir. 2014); *United States v. Obregon*, 748 F.2d 1371, 1374 (10th Cir. 1984) (renter and authorized driver(s) of rental car have privacy interest in rental car); *United States v. Flores*, No. 2:14-CR-260-RJS, 2015 WL 93866, at *4 (D. Utah Jan. 7, 2015), *aff'd*, 641 F. App'x 817 (10th Cir. 2016) (same). The Court does not find the Government's attempts to distinguish *Byrd* compelling given the broad language of the opinion. As an aside, the Court also notes the fact that the rental car was overdue and being used to transport drugs in violation of the rental agreement does not defeat standing to challenge the stop and search. *See United States v. Jeter*, 394 F. Supp. 2d 1334, 1344–45 (D. Utah 2005), *aff'd,* 175 F. Appx. 261 (10th Cir. 2006).

occurring." *United States v. Cervine*, 347 F.3d 865, 870 (10th Cir. 2003); *see also United States v. Legge*, 414 F. Appx. 124, 127 (10th Cir. 2011). "While either probable cause or reasonable suspicion is sufficient to justify a traffic stop, only the lesser requirement of reasonable suspicion is necessary." *United States v. Callarman,* 273 F.3d 1284, 1287 (10th Cir. 2001). To determine if a stop was reasonable the Court relies on the principles of *Terry v. Ohio*, 392 U.S. 1. *See Chavez*, 534 F.3d at 1343. Ultimately, "[w]hen evaluating the reasonableness of the initial stop [of a vehicle], [the] sole inquiry is whether this particular officer had reasonable suspicion that this particular motorist violated any one of the multitude of applicable traffic and equipment regulations of the jurisdiction." *United States v. Tang*, 332 F. Appx. 446, 449 (10th Cir. 2009).

Both Defendants assert Trooper Petruso lacked reasonable suspicion. (ECF Nos. 51, 52). According to the Trooper's report and testimony, he observed the car move from the far-left lane to the center lane without a proper signal. (ECF No. 51-1). Trooper Petruso relayed this to Defendant Reyna on the dash cam video as the reason for the stop. Failure to appropriately signal would be a violation of Wyoming traffic law. *See* Wyo. Stat. Ann. § 31-5-217*; State v. Juarez*, 2011 WY 110, ¶ 12, 256 P.3d 517, 520 (Wyo. 2011) (interpreting this provision and noting "This Court has found that changing lanes, (moving 'right or left') requires proper signaling."); *State v. Welch*, 873 P.2d 601, 602 (Wyo. 1994) (finding failure to signal at least 100 feet prior to changing lanes under 31-5-217(b) provided reasonable suspicion for traffic stop). If this violation was observed, it justified a traffic stop.

Trooper Petruso testified on the purported lack of signaling. However, this portion of the stop was not captured on video due to an alleged power failure. The Trooper's initial testimony on why this video was lost was somewhat weak. He testified he turned his vehicle off and on at the car barn and lost approximately forty seconds of the video, which happens to be the portion that captures the purported traffic violation. He testified he knew of the failure when he wrote the incident report but did not put it in the original report. Trooper Petruso testified he could not remember this power failure issue happening before or since in his vehicle and reported there were no repairs to his car as a result of this incident. There was no contemporaneous documentation of the incident and at best Trooper Petruso reported it verbally to a superior. The Court continued the hearing to receive further testimony on this "power failure" video issue.

The second hearing took place on July 26, 2019. At that time, the Court heard from David Luegering, a Wyoming Highway Patrol equipment specialist. Mr. Luegering credibly testified he had investigated the missing video beginning July 19 and determined the issue to be a failure of the Trooper's pre-record video function[3]. According to a letter obtained from the manufacturer, this failure was a result of the Trooper starting the video recording on the instant stop prior to the video from his previous stop fully buffering.[4] This buffering can take up to thirty-five seconds. This conclusion is corroborated by two things. First, the timing of the video of the stop immediately prior, which ends at 16:51:04, and

[3] The pre-record function captures the minute prior to light activation or other camera activation without audio by going back and accessing the always recording video stream.

[4] There is no evidence that Trooper Petruso knew or should have known the prior video was still buffering or intended to hamper the recording of the instant stop.

the video of the instant stop which begins at 16:51:36, less than thirty-five seconds later. Second, the stop video in this case begins with full audio. According to the testimony of Mr. Luegering, the pre-record function never has audio. This supports the finding of a credible pre-recording error not attributable to Trooper Petruso. The Trooper's initial testimony is further corroborated by the fact that the system did label the video "power failure" to the end user without further explanation. His belief that the error was caused by a power failure appears to be reasonable given his apparent lack of advanced technical understanding. The Trooper's testimony, along with the corroborating testimony of Mr. Luegering and other objective evidence supports a finding that Trooper Petruso had reasonable suspicion to stop the Defendants for a traffic violation.[5]

Next, both Defendants argue the Trooper lacked probable cause to search the vehicle. They focus on the dog sniff and subsequent alert or lack thereof. "Probable cause exists when there is a 'fair probability' that contraband is in the car to be searched. Probable cause is a 'commonsense, nontechnical conception[] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *United States v. Echeverria*, 203 F. Appx. 936, 938–39 (10th Cir. 2006) (internal citations omitted). A dog sniff around the exterior of a

[5] Defendants argue this Court should take a policy stance against such "sloppy police work" and recording. While the Court certainly acknowledges that this situation could have been handled better by Trooper Petruso, this is not a court of public policy. Rather, the Court must find and apply the relevant law. The question here is not whether the video error was addressed perfectly, but whether Trooper Petruso had reasonable suspicion that this particular motorist violated any one of the multitude of applicable traffic and equipment regulations of the jurisdiction. *Tang*, 332 F. Appx. at 449. With the testimony and objective evidence corroborating his story regarding the video and thus bolstering his credibility, the Court finds no other reason to question the Trooper's recounting of the stop and violation he witnessed.

vehicle during a lawful traffic stop is not a Fourth Amendment search. *See Stewart*, 473 F.3d at 1270. Further "[i]t is well established that [a] canine alert [provides] probable cause to search a vehicle." *Moore*, 795 F.3d 1224, 1231 (10th Cir. 2015) (internal quotations omitted). "The Tenth Circuit has held that a dog alert 'usually is at least reliable as many other sources of probable cause and is certainly reliable enough to create a 'fair probability' that there is contraband.'" *United States v. Chavez*, No. 17-40106, 2018 WL 4053382, at *6 (D. Kan. Aug. 24, 2018). However, a dog alert may not always provide probable cause, particularly where the accuracy of the particular dog may be questioned. *United States v. Ludwig*, 10 F.3d 1523, 1528 (10th Cir. 1993). To determine if the probable cause standard is satisfied, the court must consider "whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." *Fla. v. Harris*, 568 U.S. 237, 248 (2013).

Defendants argue K9 Becky failed to alert and thus probable cause has not been established. The Tenth Circuit has explained that a final indication is not required to establish probable cause.[6] *See United States v. Parada*, 577 F.3d 1275, 1282 (10th Cir. 2009) ("[A] dog's alert to the presence of contraband is sufficient to provide probable cause. We decline to adopt the stricter rule urged by Mr. Parada, which would require the dog to give a final indication before probable cause is established."); *Chavez*, 2018 WL

[6] The Court recognizes there are factual distinctions between a "final indication" and an "alert." For the purposes of this motion however, these do not impact the Court's analysis given the finding that K9 Becky displayed at minimum a change in behavior which is bolstered by other evidence to establish probable cause.

4053382, at *7. However, "[a] behavior change *alone* would not constitute probable cause." *United States v. Munoz-Nava*, 524 F.3d 1137, 1145–46 (10th Cir. 2008) (emphasis added). "This does not preclude the court's consideration of the behavior change, however, when determining whether all of the relevant evidence establishes probable cause." *Id.* (considering change in dog's behavior and other factors such as suspicious boots associated with possible drug trafficking, pattern of traffickers using boots with false compartments, and defendant's unusual explanations to establish probable cause); *see also United States v. Guzman,* 75 F.3d 1090, 1096 (6th Cir. 1996) (holding dog's interest in bag, in addition to other factors, established probable cause); *Chavez*, 2018 WL 4053382, at *7 (finding dog's behavior change along with vehicles recent purchase and registration, multiple cell phones, inconsistent travel plans, and criminal history of drug trafficking established probable cause). Finally, "[t]he absence of a full alert does not negate probable cause when other circumstances support such a finding." *United States v. Ramirez,* 342 F.3d 1210, 1213 (10th Cir. 2003).

Defendants ignore all but the dog sniff in arguing a lack of probable cause. Here, the totality of the relevant evidence establishes probable cause. First, the K9 at minimum indicated a change in behavior according to Trooper Petruso, an expert in Becky's behavior. The Court finds his testimony about the dog and her behavior credible. *See United States v. Beltran-Palafox*, 731 F. Supp. 2d 1126, 1160 (D. Kan. 2010). Together with this change in behavior, Trooper Petruso also credibly testified he smelled marijuana in the vehicle. This in itself supports a finding of sufficient probable cause. *See United States v. Pittman*, 2019 WL 3213532 at *2 (10th Cir. Jul. 17, 2019); *United States v.*

Zabalza, 346 F.3d 1255, 1259 (10th Cir. 2003) ("An officer's detection of the smell of drugs in a vehicle is entitled to substantial weight in the probable cause analysis. This court has long recognized that marijuana has a distinct smell and that the odor of marijuana alone can satisfy the probable cause requirement to search a vehicle or baggage."); *United States v. Stancle*, 184 F. Supp. 3d 1249, 1256 (N.D. Okla. 2016) ("[T]he Tenth Circuit has repeatedly held that an officer's detection of the smell of marijuana 'alone establishes probable cause to search a vehicle for the illegal substance.'") This testimony is corroborated by the Trooper's contemporaneous statements on the dash cam video to Defendant Reyna regarding the odor of marijuana. (ECF No. 51-2).

A third circumstance the Court considers is Defendants' use of air fresheners in a rental car. *See United States v. Brown*, 313 F. Supp. 2d 1108, 1117 (D. Kan. 2004), *aff'd*, 234 F. Appx. 838 (10th Cir. 2007) (recognizing air fresheners used to mask drug odor, factor in analysis); *United States v. Ivey*, 313 F. Supp. 2d 1242, 1250 (D. Utah 2004) (same). This is compounded by Defendant Reyna's opening of a new air freshener while speaking with Trooper Petruso. (ECF No. 51-1). Another factor before the Court is Defendants' use of a rental car. While not inherently suspect, the fact that the vehicle was picked up outside their reported hometown and was overdue is a consideration in the probable cause analysis. *United States v. Williams*, 271 F.3d 1262, 1270 (10th Cir. 2001) ("[A]nswers to questions suggesting an individual is concealing the fact that he had rented a car in a known drug source area can 'give rise to suspicion.'"); *United States v. McRae*, 81 F.3d 1528, 1535 (10th Cir. 1996) (cavalier attitude regarding returning overdue rental car factor in reasonable suspicion analysis); *see also United States v. Brown*, 313 F. Supp.

2d 1108, 1117 (D. Kan. 2004), *aff'd,* 234 F. Appx. 838 (10th Cir. 2007) (overdue rental car). Further, Defendants travel plans were vague and unclear including their starting location and the inability to provide names for alleged family members. The Court also notes according to the Trooper's report, Defendant Reyna did not even know Defendant Aldaco's last name despite reporting they have dated for a year. *See United States v. Ozbirn*, 189 F.3d 1194, 1200 n.4 (10th Cir. 1999) ("[V]ague descriptions of travel plans may still serve to bolster the finding of probable cause when considered as part of the totality of the circumstances.") Taken together, the odor of marijuana[7], K9 Becky's change in behavior, the use of air fresheners in an overdue rental car and the suspect and vague travel plans establish probable cause for a search.

CONCLUSION

In light of the above analysis, the Court finds the Defendants' Motions to Suppress must be denied. Therefore, IT IS HEREBY:

ORDERED that Defendant Aldaco's *Motion to Suppress Illegally Obtained Evidence* (ECF No. 51) and Defendant Reyna's *Motion to Suppress* (ECF No. 52) are DENIED.

Dated this 30th day of July, 2019.

Scott W. Skavdahl
United States District Judge

[7] This factor alone likely justifies the search under existing Tenth Circuit precedent.